

In the
**United States Circuit Court
of Appeals**

For the Ninth Circuit

PORTLAND FEEDER COMPANY, a corporation,
Plaintiff in Error.

vs.

OREGON SHORT LINE RAILROAD COMPANY,
a corporation,
Defendant in Error.

Brief for Defendant in Error

**On Writ of Error to the District Court of the
United States for the District of Oregon**

CAREY and KERR and CHARLES A. HART,
Yeon Building, Portland, Oregon, Attorneys for
Plaintiff in Error.

GEO. H. SMITH, A. C. SPENCER and W. A.
ROBBINS, Wells Fargo Building, Portland,
Oregon. Attorneys for Defendant in Error.



No. 3104

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

PORTLAND FEEDER COMPANY, a corporation,
Plaintiff in Error.

vs.

OREGON SHORT LINE RAILROAD COMPANY,
a corporation,
Defendant in Error.

Brief for Defendant in Error

**On Writ of Error to the District Court of the
United States for the District of Oregon**

*United States Circuit Court of Appeals for the
Ninth Circuit.*

PORTLAND FEEDER COMPANY, a corporation,
Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
a corporation,
Defendant in Error.

CAREY and KERR and CHARLES A. HART,
Yeon Building, Portland, Oregon, Attorneys for
Plaintiff in Error.

GEO. H. SMITH, A. C. SPENCER and W. A.
ROBBINS, Wells Fargo Building, Portland,
Oregon, Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

This is a companion case to *Oregon Short Line Railroad Company v. Portland Cattle Loan Company*, and while these cases were not consolidated, they were in fact tried together in the lower court and general findings made in favor of the defendant in error as is shown in 245 Federal, page 214.

The tariffs and rates involved in this case are substantially the same as those involved in the Portland Cattle Loan case, and no good purpose can be served in re-arguing the general question. However, as the thirty-two cars of cattle, described in defendant in error's second cause of action, moved from Abernathy, Texas, instead of Hereford, Texas, it will be necessary to briefly refer to the application of rates from Abernathy to Oregon Short Line Railroad points.

POINTS AND AUTHORITIES.

I.

On the thirty-two cars of cattle moving from Abernathy to O. S. L. points, it is conceded that defendant in error is entitled to recover the sum of six hundred twenty-seven dollars and twenty cents (\$627.20), as prayed for in its second cause of action, (Trans. of Record, page 153 *et seq.*).

II.

There is no controversy in this case concerning the application of rates north of Amarillo, but the entire controversy is centered about the charges from Abernathy to Amarillo.

Trans. of Record, pp. 51-168.

ARGUMENT.

This case involves two causes of action. In the first one the plaintiff is seeking to recover the sum of two hundred thirty dollars and forty cents. (\$230.40), representing the balance due on a shipment of thirty-six cars of cattle moving from Hereford, Texas, to Monida, Montana. The amount involved in the first cause of action is made up as follows:

Sept. 14, 1912. Defendant shipped 36 cars of cattle from Hereford, Texas, to Mon- ida, Montana, at \$144.90 per car.....	\$5,216.40
Received on account	4,986.00
	<hr/>
Balance due	\$ 230.40

The construction and application of rates from Hereford to O. S. L. points has already been argued at length in defendant in error's brief in the Portland Cattle Loan case and the same argument will apply in this case.

In the second cause of action, plaintiff is seeking to recover the sum of six hundred and twenty-seven dollars and twenty cents, (\$627.20), representing the balance due on a shipment of twenty-one cars of cattle moving from Abernathy, Texas, to Pocatello, Idaho, and eleven cars of cattle moving from Abernathy, Texas, to Pocatello, Idaho, which cars were later diverted to American Falls, Idaho. The amount involved in the second cause of action is made up as follows:

21 cars Abernathy to Pocatello at \$156.10	
per car	\$3,278.10
11 cars, Abernathy to Pocatello, diverted to	
American Falls, at \$170.10 per car.....	1,871.10
	<hr/>
Total freight charges	\$5,149.20
Received on account	4,522.00
	<hr/>
Balance due	\$ 627.20

In regard to the amount prayed for by the defendant in error in the second cause of action, we call the court's attention to page 155, *et seq.*, to the Transcript of Record, wherein counsel for plaintiff in error admits that defendant in error's construction and application of the tariffs, insofar as the Abernathy shipments are concerned is correct, and that defendant in error is entitled to recover the sum of six hundred twenty-seven dollars and twenty cents (\$627.20) ; we are, therefore, only concerned in regard to the charge of two hundred forty dollars and thirty cents, (\$240.30), representing the amount prayed for in defendant in error's first cause of action, which involves the shipments moving from Hereford to O. S. L. points. As we have already pointed out, the tariffs covering the movement from Hereford to O. S. L. points have been argued at length in the Portland Cattle Loan case, and we therefore, do not deem it necessary to repeat the same argument herein. We do, however, wish to call the court's attention to the fact that there is no dispute between the litigants concerning the proper application of rates to be applied north of Amarillo. (Trans. of Record, pages 51-168.)

The court will observe, by referring to page 134, *et seq.*, of the Transcript of Record, that Mr. J. H.

Lothrop, an expert witness, was called on behalf of the plaintiff in error and undertook to construe the tariffs in question. The substance of his testimony is, *first*, that the Amarillo rate applies from Hereford through to O. S. L. points, because no differential is shown in Section 1, page 26 of Plaintiff's Exhibit 1, (Trans. of Record, page 141), and *second*, that the Abernathy rate will not apply through to O. S. L. points because a differential of eight dollars and eighty cents is shown, over the Amarillo rate on page 26 of Plaintiff's Exhibit 1, (Trans. of Record, page 144), and *third*, the witness admitted, that there is no through routing shown in the tariff from P. & N. T. points to O. S. L. points, (Trans. of Record, page 148).

To show the inconsistency of Mr. Lothrop's testimony in regard to Abernathy rates, we desire to call the court's attention to Item 200, page 24 of Plaintiff's Exhibit 1, which says:

"The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates, as shown in Section No. 2 hereof, pages 32 to 51, inclusive, to arrive at the through rate, *where application and routing is provided on pages 56 to 69.*

"When no differentials are shown the Amarillo or El Paso, Deming rates as shown in Section No. 2 are to be applied *as indicated.*"

Pages 56 to 69 shows (page 57), under application of rates, no through routes are named from P. & N. T. points to O. S. L. points. Notwithstanding this fact, the witness would have the court believe, that where no differential is shown in Section No. 2 of the tariff, that Hereford would take the Amarillo rate even though the P. & N. T. Ry. Co. and the O. S.

L. R. R. Co. refused to enter into any through routing arrangements. The absurdity of this contention is apparent by referring to Section No. 1, page 26 of Plaintiff's Exhibit 1. Under the heading of "Pecos & Northern Texas Railway," the court will note under Index No. 98, that all shipments moving from Hereford take the Amarillo rate where a through route is named on page 57 of Exhibit 1, whereas Abernathy, which is also shown on page 26 of Plaintiff's Exhibit 1, under Index No. 120, takes a differential of eight dollars and eighty cents over the Amarillo rate; in all cases where through routes are provided on page 57, Plaintiff's Exhibit 1, the tariff plainly states on page 26, that the differential of eight dollars and eighty cents must be added to the Amarillo rate on shipments moving from Abernathy.

Notwithstanding this plain statement in the tariff, Mr. Lothrop testified that on shipments moving from Abernathy to O. S. L. points, the differential of eight dollars and eighty cents could not be applied, under Item 200 of Section No. 1 of the tariff, for the reason that a differential is shown on shipments moving from Abernathy, which therefore makes it necessary to apply the combination of locals, rather than the eight dollars and eighty cents differential above referred to, in other words, the tariff plainly says, on page 26 of Plaintiff's Exhibit 1, that on all shipments moving from Abernathy, a differential of eight dollars and eighty cents must be added to the Amarillo rate, whereas on shipments moving from Hereford, the Amarillo rate will apply. Mr. Lothrop seeks to apply the rule insofar as the Hereford shipments are concerned, totally disregarding the fact that no through route is

shown on page 57 of the tariff, and then states that the eight dollars and eighty cents differential could not be added on the Abernathy shipments, for the reason that no through route is shown in the tariff, and therefore the rate from Abernathy must be made up by combination of locals, as prayed for in defendant in error's second cause of action; we call the attention of the court to the fact that Hereford and Abernathy are both P. & N. T. points and that no through routes are provided from any P. & N. T. points to O. S. L. points.

We submit there is no justification for such a strained construction of tariff, and as a matter of fact, the admission by plaintiff in error that defendant in error is entitled to recover on the second cause of action shows the absurdity and inconsistency of such a construction of the tariff.

We respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

GEO. H. SMITH,
A. C. SPENCER,
W. A. ROBBINS,
Attorneys for Defendant in Error.

